St. John's Mercy Health System d/b/a St. John's Mercy Medical Center *and* United Food & Commercial Workers Union Local 655, AFL–CIO, CLC. Case 14–CA–27851

March 31, 2005

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND SCHAUMBER

On December 6, 2004, Administrative Law Judge Paul Bogas issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, St. John's Mercy Health System d/b/a St. John's Mercy Medical Center, St. Louis, Missouri, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Dated, Washington, D.C. March 31, 2005

Robert J. Battista, Chairman

Wilma B. Liebman, Member

Peter C. Schaumber, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[1] In adopting the judge's finding that the Respondent violated Sec. 8(a)(5) and (1) of the Act by refusing to give effect to the parties' contractual union-security provision, Chairman Battista notes that the Respondent was obligated to abide by the collective-bargaining agreement that it had negotiated and that, in any event, the Respondent, on the facts of this case, failed to show that adherence to the contract's union-security provision would have caused it to violate public policy by failing to meet state-mandated staffing levels for nurses.

Catherine L. Ventola, Esq., for the General Counsel.
Caryn L. Fine, Esq., (The Lowenbaum Partnership), of St. Louis, Missouri, for the Respondent.
Karl Sauber, Esq., for the Charging Party.

DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. This case was tried in St. Louis, Missouri, on September 14, 2004. The United Food & Commercial Workers Union Local 655, AFL–CIO, CLC (the Union) filed the original charge on April 22, 2004, and the amended charge on June 16, 2004. The Regional Director for Region 14 of the National Labor Relations Board (the Board) issued the consolidated complaint on June 24, 2004. The complaint alleges that St. John's Mercy Medical Center (the Respondent), violated Section 8(a)(5) and (1) of the Act by failing to give effect to a provision in its labor contract that requires the discharge of unit employees who fail to pay union dues and fees. The Respondent admits that, despite repeated requests by the Union, it has declined to comply with this provision in the contract. The Respondent argues, however, that a violation should not be found because the employees at issue are registered nurses and discharging them pursuant to the union-security provision would compromise patient care in violation of public policy.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the parties, I make the following findings of fact and conclusions of law.[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a not-for-profit corporation with its principal offices and place of business in St. Louis, Missouri, operates a full-service hospital (the hospital), from which it annually derives gross revenues in excess of $250,000, and purchases and receives goods valued in excess of $50,000 directly from points outside the State of Missouri. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7), and a health care institution within the meaning of Section 2(14) of the Act. The Respondent further admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background[2]

The Respondent operates a hospital in St. Louis, Missouri. It employs approximately 1400 registered nurses (RNs) who,

[1] The General Counsel and the Union rested their cases entirely on written stipulations of fact agreed to by all parties. (GC Exh. 1(L)). The Respondent bases its case on those stipulations plus the trial testimony of three witnesses.

[2] The Respondent's unopposed motion to correct the transcript, made in its brief, is granted.

since July 27, 1999, have been represented by the Union.[3] After extensive negotiations, the Respondent and the Union entered into a collective-bargaining agreement that became effective on October 23, 2001. Among the agreement's provisions is a union-security clause, which provides that RNs are required to pay union dues and fees and that the Respondent will, upon written request by the Union, discharge RNs who fail to do so.[4] As of March 2002, union dues ranged from $15 to $35 per month, depending on the number of hours the particular RN was working.

In early 2002, the Union notified the Respondent that a number of RNs were not paying these monthly dues. Since February of 2002, the Union has repeatedly requested that the Respondent discharge such RNs pursuant to the union-security provision. The Respondent has refused all of these requests. On two occasions, once on April 16, 2003, and once on April 2, 2004, arbitrators mutually selected by the Respondent and the Union ruled that the Respondent's failure to discharge the defaulting RNs was a violation of the collective-bargaining agreement. Each arbitrator issued an award directing the Respondent to terminate the defaulting RNs pursuant to the contract. Despite these decisions, which are final and binding pursuant to the collective-bargaining agreement, the Respondent has persisted in its refusal to give effect to the union-security provision. To the contrary, in an April 2003 letter, the Respondent told the defaulting RNs that, regardless of the recent arbitrator's decision, it did not intend to discharge any of them for failing to pay their union fees and dues.[5] One year later, after the second arbitrator's decision, the Respondent again informed the defaulting RNs, in writing, that despite the results of the arbitration it did not intend to discharge them. The Respondent also informed union officials that it would refuse to terminate any RNs for failing to pay. On April 23, 2004, the Union filed an action in the United States District Court for the Eastern District of Missouri, Eastern Division (Case No. 4 04CV00480CDP), seeking enforcement of the second arbitrator's award.[6]

Subsequent to the time period covered by the second arbitrator's award (May 2003 to December 15, 2003), a number of other RNs have refused to pay their union dues. In letters to these employees, the Union stated the amount of dues owed, the months for which the dues were owed, and the method used to compute the amount. Each letter gave the defaulting RN at least 2 weeks in which to comply, and stated that after that time the Union would seek the RN's discharge. The Union also provided these RNs with union membership applications that advised them of their rights and obligations under *Communications Workers of America v. Beck*, 487 U.S. 735 (1988) and *NLRB v. General Motors Corp.*, 373 U.S. 734 (1963). Since December 19, 2003—i.e., during the time period covered by the complaint—the Union has asked in writing that the Respondent discharge 14 RNs who failed to pay dues after receiving one of these letters. Those 14 are the only RNs among the 1400 employed by the hospital, who the General Counsel is asking me

[3] The RN unit is defined as follows:

> All full-time and regular part-time RNs employed by Respondent as Clinical Nurses, Clinical Nurses Per Diem, RN First Assistants, Trauma Service Coordinators, Care Coordinators, Lactation Consultants, RN Practitioners, Cardiovascular RNFAs, RN Childbirth Instructors, Natural Family Planning Practitioners, Practice Perinatal Coordinators, Cancer Information Center Nurses, Quality Management Coordinators, Natural Family Planning Coordinators, Coordinators of Reproductive Endocrinology, Mercy Heartprint Coordinators, NICU Family Support Coordinators, NICU Follow-Up Coordinators, Pediatric Education Coordinators, Perinatal Education Coordinators, Infection Control Specialists, Care Path Coordinators, Oncology Nurses, Neonatal Nurse Practitioners, Neonatal Nurse Practitioner Coordinators, Advanced Nurses Clinicians, Nurse Clinicians, Transplant Coordinators, Program Coordinators-Behavioral Health, RN Instructors, Case Management Specialists, Program Coordinators-Rehabilitation, Combined Decongestive Therapists, Peer Review Coordinators, Team Leaders—OR, Paramedic Education Coordinators, Stemcell Transplant Coordinators, Team Leaders-Donor Room, Quality Improvement Coordinators, Perinatal Outreach Coordinators, Pre-Admission Assessment Nurses, Staff Development Coordinators employed in the St. John's Mercy Medical Center acute care hospital buildings, Edgewood building, Skilled Nursing building, Doctors buildings, Sports Rehabilitation building, Pain Center building, Child Development Center building and the JFK and Meacham Park Clinics, EXCLUDING all office clerical employees, other professional employees, guards supervisors as defined in the Act, physicians, technical employees, nonprofessional employees, business office clerical employees, skilled maintenance employees, and all other employees.

[4] The union-security clause is contained in art. 4 of the collective-bargaining agreement, which states as follows:

> *Section 4.1 Conditions of Employment.* As a condition of continued employment, all RNs included in the collective bargaining unit shall, prior to ninety-one (91) days after the start of their employment with the Medical Center, or the effective date of this Agreement, whichever is later, become members of the Union and pay to the Union the periodic monthly dues and initiation fees uniformly required of all Union members. The Union shall certify to the Medical Center the Amount that constitutes periodic monthly dues.
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> *Section 4.2 Discharge of Non-Members*. The failure of any RN to become or remain a member of the Union at such required time by paying initiation fees and regular monthly dues uniformly required as a condition of membership shall obligate the Medical Center, upon written notice from the Union to such effect and to the further effect that Union membership was available to such RN on the same terms and conditions generally available to other members, to discharge such RN within ten (10) working days following the receipt of such notice.
>
> *Section 4.3 Hold Harmless*. The Union recognizes and accepts sole responsibility for any action arising out of any Union demand for the discharge of any RN pursuant to the terms of this Agreement. In any and all cases where the Medical Center complies with the Union demand in reliance upon a written notice respecting membership in the Union, the Union shall indemnify and hold the Medical Center harmless for any resulting liability, including, but not limited to, back pay, lost benefits, other damages, interest, costs, expenses, and reasonable attorney's fees.

[5] The letter also asked RNs "to consider to start paying . . . required monthly dues." (Emphasis added.)

[6] The federal action to enforce the arbitrator's award is pending. In its brief the Respondent renews its motion, which I denied at the start of the trial, to hold the instant proceeding in abeyance pending the outcome of the district court action regarding the arbitrator's award. I hereby reaffirm my decision denying the Respondent's motion.

to order the Respondent to discharge, although a prospective order could require additional discharges in the event that other RNs refused to pay their dues in the future. The Respondent states that there are a total of 50 defaulting RNs currently in its employ who the Union is requesting that it discharge;[7] however, the Respondent's summary document listing these individuals confirms that only 14 of the RNs are individuals regarding whom the Union has sought enforcement of the union-security provision during the time period covered by the complaint. (R. Exh 11(a).)[8]

During the period from the beginning of 2002 to the time of trial, the Union has on two occasions agreed to effectively pardon RNs for past failures to pay the required dues. In settlement of a ULP charge filed by the Respondent in 2002, the Union withdrew the requests that it made in February and March 2002 for the discharge of defaulting RNs. Then, on May 5, 2003, in settlement of the first arbitration award, the Union agreed to waive the discharge of the RNs covered by the award, and instead accepted a cash payment from the Respondent to be credited towards those RNs' delinquencies. However, after those pardons the Respondent still refused to give prospective effect to the union-security provision, or even to warn RNs that it might discharge them in the future if they failed to comply. There is no way of telling, based on the record before me, whether a significant number of RNs would choose not to pay their union dues if the Respondent made clear that discharge would result from failure to do so. However, I believe it is fair to infer that a number of the defaulting nurses would have chosen to pay their union dues rather than sacrifice their positions, and that the Respondent's declarations that it would not punish noncompliance increased the number of RNs who defaulted.

The Respondent argues that its refusal to give effect to the contract is justified by a severe shortage of RNs in the St. Louis area. In support of this position, the Respondent introduced testimony concerning the RN vacancy rate—i.e., the number of vacant RN positions at the hospital expressed as a percentage of the number of RNs that the hospital had determined it needed to properly care for patients. The testimony was that the overall RN vacancy rate for hospitals in the State of Missouri has recently been about 9 to 12 percent. The same vacancy rate is seen for hospitals in the St. Louis area. The Respondent's vacancy rate during the year prior to trial has typically been somewhat lower than those statewide and St. Louis averages—between 7 and 9 percent most months. The Respondent's vacancy figures, moreover, may have been inflated during some months by its decision to add a significant number of hospital beds in January 2004, thereby increasing its staffing needs. The Respondent's vacancy rate at the time of trial had declined to between 4 and 6 percent.[9] Discharge of the 14 RNs identified by the General Counsel in this case would result in an increase of approximately 1 percent in the Respondent's vacancy rate, still leaving the Respondent in a considerably better position than is generally the case for hospitals in the St. Louis area and across Missouri. The Respondent states that it is required under Missouri's Hospital Licensing Law and Missouri Department of Health guidelines to maintain adequate nurse staffing, but the record does not show that terminating the 14 defaulting RNs would bring it out of compliance with any such requirements, and indeed such a result seems unlikely given the evidence regarding the higher vacancy rates in the Respondent's own recent past, and at other hospitals across the State.[10]

B. Complaint Allegation

The complaint alleges that since about December 19, 2003, the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to give effect to the section in its collective-bargaining agreement with the Union that requires the Respondent, upon notice from the Union, to discharge unit members who fail to meet the contractual requirement to pay union dues and fees as a condition of continued employment.

Analysis

The Board has repeatedly held that an employer's refusal to honor a union-security provision and discharge defaulting unit members constitutes an unfair labor practice in violation of Section 8(a)(5) and (1) of the Act. *Wire Products Mfg. Corp.*, 329 NLRB 155, 163 (1999); *McIntyre Engineering Co.*, 293 NLRB 716, 717 (1989); *Litton Systems*, 283 NLRB 973, 976 (1987), enf. denied on other grounds 868 F.2d 854 (6th Cir. 1989); *Spear Meat Co.*, 256 NLRB 117, 119 (1981). As was recognized in *Montgomery Ward & Co.*, 162 NLRB 369, 381 (1966), a union-security provision is "as much a condition of employment as wages," and an employer can "no more alter legally the union-security provision by unilateral action than it could, "for example make unilaterally" a mid-term contract modification by reducing contract wage rates." In this case, it is undisputed that the Respondent refused repeated requests by the Union that it terminate unit members who were not paying their union dues pursuant to a lawful union-security provision.[11] By doing this, the Respondent unilaterally altered the

[7] Fifty-one are listed by the Respondent, but the name of one—Aurora Miller—appears twice.

[8] Since December 19, 2003, the Union has made written requests that the Respondent discharge the following 14 RNs: Julie Boschert, Elizabeth Drumm, Nancy Eckhard, Karen Elders, Susan Faust, Aurora Miller, Dorothy Markiewicz, Michelle Mueller, Gloria Newman, Dale Philpot, Tracey Rahn, Marra Spell, Andrea Weber, Joan Weisberg.

[9] Christine Craine, the Respondent's Chief Nurse Executive, initially testified on direct examination that the hospital's current RN vacancy rate was six percent. Tr. 36. Then on cross examination she stated that the vacancy was now "around 5 or 6 percent." Tr. 69. Later during cross examination she conceded that at a recent meeting of the Professional Nursing Practice Committee in August 2004 she "might" have reported that the Respondent's RN vacancy rate was only 4 percent. Tr. 75–76.

[10] Moreover, the Respondent has not shown that violating its obligations under the collective bargaining agreement and federal labor law is the only way to maintain the necessary staffing levels. Certainly it has other, lawful, means available to do that, such as improving the terms and conditions of employment for RNs.

[11] The Respondent does not appear to dispute that the collective-bargaining agreement's terms provide that defaulting RNs will, upon written notice by the Union, be discharged. At any rate, I rely on the two arbitration decisions, both of which interpreted the contract as requiring the Respondent to comply with Union requests that defaulting RNs be discharged. See *American Commercial Lines*, 291 NLRB 1066,

union-security provision in the contract in violation of Section 8(a)(5) and (1) of the Act.

The Respondent argues that it is having difficulty recruiting and retaining RNs because of a nursing shortage, and therefore should be granted a public policy exemption from its obligations under the collective-bargaining contract provision, and Section 8(a)(5) and (1) of the Act. On the record in this case, it is highly unlikely that the Respondent's compliance with the union-security provision would have significant implications contrary to public policy, much less any implications serious enough to outweigh the public policy in favor of meaningful collective bargaining and industrial peace. See *Mimbres Memorial Hospital & Nursing Home*, 342 NLRB No. 33, slip op at 1(2004), (remedy against hospital justified by Act's policy of "fostering meaningful collective bargaining and industrial peace"). However, the more important point is that the Board has never recognized the type of generalized public policy exemption sought by the Respondent. The Respondent does not cite a single case that even suggests such an exemption exists under Board law. The best the Respondent can do is point to a case in which the Board held that employees discharged for misconduct observed by surveillance camera would not be ordered reinstated even though installation of the cameras was an unlawful unilateral change. See *Anheuser-Busch, Inc*., 342 NLRB No. 49 (2004). Not only do those facts bear no resemblance to the ones at issue here, but the holding was based on a specific exception in Section 10(c) of the Act, which states that, "[n]o order of the Board shall require the reinstatement of any individual . . . suspended or discharged for cause." Slip op. at 2. There is no similar provision in the Act providing that health care providers, or any other employers, may abrogate portions of a collective-bargaining contract because the employer considers what it agreed to excessively burdensome.[12] If the Respondent wants to add such an exception to the Act, it must make its plea to the legislative branch,[13] not in this forum.

For the reasons discussed above, I conclude that, since December 19, 2003, the Respondent has violated Section 8(a)(5) and (1) of the Act by refusing to give effect to article 4, section 4.2 of the collective-bargaining agreement, which requires it, upon request of the Union, to terminate unit RNs who have not met the contractual requirement of paying dues or fees to the Union.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent has violated Section 8(a)(5) and (1) of the Act since December 19, 2003, by refusing to give effect to the provision in its collective-bargaining agreement with the Union that requires the Respondent, upon written notice from the Union, to discharge unit members who have not met the contractual requirement of paying dues or fees to the Union.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.[14]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order[15]

ORDER

The Respondent, St. John's Mercy Health System d/b/a St. John's Mercy Medical Center, St. Louis, Missouri, its officers, agents, successors, and assigns, shall

1075–1076 (1988) (Board relies on arbitration board's interpretation of contract in resolving unfair labor practice question.).

[12] Indeed, the Board has previously rejected assertions that a nursing shortage, or concerns about patient care, should trump the operation or purposes of the National Labor Relations Act. In *Abbott Northwestern Hospital*, 343 NLRB No. 67, slip op. at 2 (2004), the Board held that the respondent's refusal to hire nurses who were on strike from another hospital was an unfair labor practice despite the respondent's concern that, "given the nursing shortage in the relevant labor market, " hiring such nurses would strengthen nurses' bargaining position and negatively affect the respondent's "ability to retain or hire nurses" at lower wage rates. In *Waters of Orchard Park*, 341 NLRB No. 93, slip op. at 2–3 (2004), the Board held that employee action to protect patient welfare at a nursing home was not protected by the Act, even though this action had taken place in the context of a state relicensing hearing. The Board explained: "The Act protects employees' interests as employees. The interests of nursing home residents are not protected by the Act." The Board has also repeatedly held that an employer's claim of economic hardship is not a valid defense, or even a relevant consideration, when evaluating the legality of an employer's unilateral repudiation of a union-security provision or other obligation in a labor contract. See *Controlled Energy Systems*, 331 NLRB 251, 256 (2000); *Endicott Forging & Mfg.*, 319 NLRB 1, 2 (1995); *R. T. Jones Lumber Co*., 303 NLRB 841, 843 (1991); *McIntyre Engineering Co.*, 293 NLRB at 716–717. See also fn. 10, supra.

[13] Congress has demonstrated that it knows how to create an exemption to union-security requirements when it wishes to do so. Sec. 19 of the Act, 29 U.S.C. Sec. 169, contains a religious exemption, but "the express language . . . limits exemptions from union-security requirements to those employees whose religious objections . . . are based on the tenets of a bona fide religion, body, or sect." *Transit Union Local 386 (Grand Rapids Coach)*, 293 NLRB 581 fn. 1 (1989). The record evidence does not show that any RN in this case based his or her refusal to make the required payments on religious objections.

[14] The General Counsel asks that I order the Respondent to honor the Union's discharge requests regarding the 14 defaulting employees, but neither the General Counsel nor the Union has asked that I order the Respondent to reimburse the Union for required dues or fees. Absent a request for the latter relief, I will not consider whether such relief is appropriate in this case. Similarly, although the record shows that the collective-bargaining agreement was set to expire on October 22, 2004 (after the close of the trial, but before the submission of posttrial briefs), the Respondent has not claimed that any remedy should end as of that date. Given that, and the possibility that the union-security provision has been extended or renewed, I will not consider whether the remedy should be confined to the period ending on October 22.

[15] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

1. Cease and desist from

(a) Failing and refusing to comply with Article 4, Section 4.2 of the collective-bargaining agreement, which requires it, upon written notice from the Union, to terminate unit RNs who have not met the contractual requirement of paying dues or fees to the Union

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Comply with article 4, section 4.2 of the collective-bargaining agreement by discharging the following employees: Julie Boschert, Elizabeth Drumm, Nancy Eckhard, Karen Elders, Susan Faust, Aurora Miller, Dorothy Markiewicz, Michelle Mueller, Gloria Newman, Dale Philpot, Tracey Rahn, Marra Spell, Andrea Weber, and Joan Weisberg.

(b) Within 14 days after service by the Region, post at St. John's Mercy Medical Center in St. Louis, Missouri, copies of the attached notice marked "Appendix."[16] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 19, 2003.

[16] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(c) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., December 6, 2004.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT fail and refuse to comply with Article 4, Section 4.2 of the collective-bargaining agreement, which requires us, upon written notice from the Union, to terminate unit RNs who have not met the contractual requirement of paying dues or fees to the Union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL comply with Article 4, Section 4.2 of the collective-bargaining agreement by discharging the following employees: Julie Boschert, Elizabeth Drumm, Nancy Eckhard, Karen Elders, Susan Faust, Aurora Miller, Dorothy Markiewicz, Michelle Mueller, Gloria Newman, Dale Philpot, Tracey Rahn, Marra Spell, Andrea Weber, Joan Weisberg.

ST. JOHN'S MERCY HEALTH SYSTEM D/B/A ST. JOHN'S MERCY MEDICAL CENTER